THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 349 / 12

In the matter between:

NATHANIEL ANDILE MNGUTI	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
JABULANI JELMOND MASHABA N.O.	**Second Respondent**
QK MEATS SA (PTY) LTD t/a DAWN FARM	**Third Respondent**

Heard: **30 June 2015**

Delivered: **28 August 2015**

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – Review concerning issue of jurisdiction – Test of rationally and reasonableness does not apply – award considered *de novo* on the basis of being right or wrong.

Resignation – conduct constituting resignation – principles consi

dered.

Dismissal – determination of existence of dismissal – finding that no dismissal exists upheld.

Review of award – conclusion of arbitrator correct – Arbitration award upheld – review dismissed.

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SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] The second respondent was called upon to decide whether the applicant had indeed been dismissed by the third respondent. According to the applicant, the third respondent simply dismissed him out of hand, whilst according to the third respondent the applicant had verbally resigned and left. In an award dated 25 October 2011, the second respondent then decided that the applicant had verbally resigned and left, and had not been dismissed by the third respondent. The second respondent then dismissed the applicant's referral. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant.

The relevant evidence

[3] The applicant had been employed by the third respondent as a team leader on 1 March 2005, and continued employment in this capacity until the termination of his employment on 31 August 2011. The applicant reported to Andrew Jordan ('Jordan'), the third respondent's production manager. The events

[1] Act 66 of 1995.

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giving rise to this matter took place on 31 August 2011, and are set out hereunder.

[4] The applicant and the third respondent had different versions about what happened on 31 August 2011. Starting with the version of the applicant, he said that he had an argument with Jordan on that day. According to the applicant, Jordan told him in the course of the argument that if the applicant wanted to leave, he (Jordan) wanted a resignation letter from the applicant. The applicant said he told Jordan that he did not have time to write a resignation letter and he then left. The applicant also contended that Jordan told him to leave. According to the applicant, Jordan also asked him to hand over his clock card at the main gate.

[5] Jordan testified that on 31 August 2011, he was returning from a stock meeting, when he noticed the applicant appeared to be agitated and frustrated. Jordan proceeded to enquire from the applicant about his daily production tasks. In the course of this discussion the applicant, who remained agitated, told Jordan that he was resigning and was leaving. Jordan did not immediately address this further, but saw the applicant walking to the technical office, where the technical manager, Lebogang Harris ('Harris') was, and then speaking to Harris. Jordan went to the office where the applicant again said he wanted to leave. In the presence of Harris, Jordan then told the applicant that if he wanted to resign, he needed to submit a resignation letter in writing so the third respondent could know when he wanted to leave. According to Jordan, the applicant refused to hand in a resignation letter and simply left. Jordan said he never asked the applicant to return his clock card, and the applicant simply handed it in himself upon leaving.

[6] Harris also testified, and said that the applicant made it clear to her on 31 August 2011 that he wanted to 'leave the company'. Harris also confirmed that in her presence, Jordan said to the applicant that if he wanted to resign, he had to put it in writing. Harris said that the applicant did not put it in writing and simply walked out, and that was the last Harris saw of him. Later that day, one of the other team leaders reported to Harris that the applicant had left his access card at the gate.

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[7] What is undisputed is that after the applicant had left, Jordan immediately sent an e-mail notice to *inter alia* the HR manager, Juanisa Brits ('Brits'), recording that the applicant had several times told him that the applicant was resigning and had left at about 12h00 on the same day.

[8] With Jordan having reported the applicant's resignation to the third respondent's HR department, a telegram was sent by Varshaa Singh ('Singh'), the HR officer, to the applicant the very same day, confirming that his verbal resignation to Jordan was accepted by the third respondent, and that he was required to contact the HR department to arrange to complete the relevant withdrawal documents. The telegram was delivered on 1 September 2011 but was not signed for by the applicant. The applicant said he never received the telegram, but did confirm that the address on the telegram where it was delivered to was his correct address.

[9] Harris wrote her own e-mail to HR on 1 September 2011, informing Brits that the applicant had said he was leaving the factory that Jordan had asked the applicant to follow procedure and submit a resignation letter, but the applicant refused.

[10] The applicant testified that he returned to work on 5 September 2011, and spoke to someone by the name of Serita, who told him to come back to work on Friday (9 September 2011). The applicant was referring to one of the other HR officers of the third respondent, being Serita Van Graan ('Van Graan'). According to the applicant, and when he came back on 9 September 2011, Van Graan was not there. The applicant then spoke to Singh who told the applicant that he will be telephoned on Monday 12 September 2011. When the applicant was not telephoned on 12 September 2011, he came back on 13 September 2011, and from the security office at the gate, he called Van Graan. The applicant said that Van Graan then told him that she had heard that the applicant had resigned and the applicant told her that he did not. Van Graan then told the applicant to go home and that he would be contacted, but he was never so contacted.

[11] The third respondent's version was different to what the applicant said, above. Van Graan testified that the applicant made contact with her only about two weeks after he resigned (12 September 2011), and said he wanted to make an

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appointment to see her. She asked him if he wanted to come and see her to fill in the pension fund forms, and he said that he wanted to come and see her because he did not resign. She then told him that he had resigned 'with his manager' and a telegram was sent accepting his resignation. There was no further discussion about this issue at the time, and the applicant did not come to see her. Van Graan testified that only on 26 September 2011, the applicant contacted her again to make arrangements to come and complete his pension withdrawal forms, and it was arranged that he would come on 28 September 2011 to do so. The applicant then came to see her on 28 September 2011 and completed the pension withdrawal documents. Van Graan further said that the applicant handed in his access card on 31 August 2011, and it had been re-issued to someone else.

[12] In the documentary evidence, there is an e-mail exchange between the applicant and Brits, which took place on 26 September 2011. In an e-mail sent by the applicant to Brits, he complains that he was waiting for two weeks' for Brits to call him, and had been sent away twice by Van Graan, saying she in turn was waiting for Brits. The applicant asked for clarity on what he should do. Brits answered on the same day, saying that the applicant resigned and left on 31 August 2011, and informed him that he should contact Van Graan to complete the pension withdrawal documents. There was no further response by the applicant to this last e-mail from Brits. The applicant however then did contact Van Graan to make arrangements to complete the pension withdrawal documents.

[13] The above was, in summary, the facts as they came before the second respondent as arbitrator. The second respondent decided, based on these facts, and other considerations I address hereunder, that the applicant had not been dismissed by the third respondent, but had repudiated his contract of employment by verbally resigning and leaving on 31 August 2011. The second respondent then dismissed the applicant's referral, giving rise to the current review application.

<u>The test for review</u>

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[14] The issue whether or not a dismissal exists concerns the jurisdiction of the CCMA. If there is no dismissal, then the CCMA has no jurisdiction to entertain an unfair dismissal claim. Where a commissioner thus finds that no dismissal exists, that commissioner in essence determines that the CCMA does not have jurisdiction and the matter is then dismissed on that basis. Where such a determination by a commissioner is then challenged on review to the Labour Court, on what basis is such review then decided?

[15] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[2] the Court considered the review test postulated by *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] and said:

> '…. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise …. ' (emphasis added)

[16] In simple terms, where the issue to be considered on review is about the jurisdiction of the CCMA, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the commissioner on jurisdiction is right or wrong. In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* the Court held:[4]

> 'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds....' (emphasis added)

[17] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[5] the Labour Appeal Court articulated the enquiry as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The

[2] (2008) 29 ILJ 964 (LAC) at para 101.
[3] (2007) 28 ILJ 2405 (CC).
[4] (1999) 20 ILJ 108 (LAC) at para 6.
[5] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.

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significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…'

[18] I have had the opportunity to deal with this kind of review test, specifically in the context of whether a dismissal exists, in *Trio Glass t/a The Glass Group v Molapo NO and Others*[6] and said:

'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[19] This 'right or wrong' review approach has been consistently applied in a number of judgments, in instances where the issue for determination on review concerned the jurisdiction of the CCMA where the commissioner had to decide whether a dismissal exists, including the judgments of *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[7], *Hickman v Tsatsimpe NO and Others,*[8] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[9] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[10] *Workforce Group (Pty) Ltd v CCMA and Others*[11] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[12]

[6] (2013) 34 *ILJ* 2662 (LC) at para 22.
[7] (2012) 33 *ILJ* 363 (LC) at para 23.
[8] (2012) 33 *ILJ* 1179 (LC) at para 10.
[9] (2013) 34 *ILJ* 392 (LC) at paras 5–6.
[10] (2012) 33 *ILJ* 1171 (LC) at para 14.
[11] (2012) 33 *ILJ* 738 (LC) at para 2.
[12] (2013) 34 *ILJ* 1272 (LC) at para 21.

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[20] I will therefore decide whether the determination of the second respondent that the applicant was not dismissed, but resigned, was right or wrong, by way of a *de novo* consideration of the justiciable facts on record.

The merits of the review

[21] The application of the proper review test in the case of a jurisdictional determination as is set out above, leaves a simple question to be decided, namely whether the second respondent's finding that the applicant was not dismissed was wrong. If this determination was wrong, then the review must succeed. But if this determination was right, the review must fail. In answering this question, it must also be considered that the applicant had the onus to prove that he was dismissed.[13]

[22] Before analysing the applicant's case and evidence, I will firstly deal with the third respondent's case that the applicant resigned. In this instance, there is no written resignation by the applicant. The case is that the applicant verbally resigned on 31 August 2011, and left on the same date. It is possible for an employee to resign in such a manner, and for an employer to rely upon such a resignation to bring about a termination of the employment relationship? In *Sihlali v SA Broadcasting Corporation Ltd*[14] the Court said:

> 'A resignation is a unilateral termination of a contract of employment by the employee. The courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention …. Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent …. In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it.'

[13] See Section 192(1) which reads: 'In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal'.
[14] (2010) 31 ILJ 1477 (LC) at para 11. See also *Uthingo Management (Pty) Ltd v Shear NO and Others* (2009) 30 ILJ 2152 (LC) at paras 16 – 19.

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The Court further held:[15]

> 'A resignation is established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention. The courts generally look for unambiguous, unequivocal words that amount to a resignation ….'

[23] Similarly, and in *Lottering and Others v Stellenbosch Municipality*[16] the Court said:

> 'The common-law rules relating to termination on notice by an employee can be summarized as follows:
> 15.1 Notice of termination must be unequivocal - *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 830E.
> 15.2 Once communicated, a notice of termination cannot be withdrawn unless agreed - *Rustenburg Town Council v Minister of Labour* 1942 TPD 220; *Du Toit v Sasko (Pty) Ltd* (1999) 20 ILJ 1253 (LC); and *Sihlali v SA Broadcasting Corporation* (2010) 31 ILJ 1477 (LC) at para 11.
> 15.3 Termination on notice is a unilateral act - it does not require acceptance by the employer - *Sihlali* at para 11; Wallis *Labour and Employment Law* para 33 at 5-10 ….'

[24] The Court in *African National Congress v Municipal Manager, George Local Municipality and Others*[17] added a further requirement, where it comes to a resignation, being that the resignation '…. must be effective immediately or from a specified date ….'.

[25] I accept that the above authorities set out the proper and correct state of the law where it comes to the issue of employment contracts being brought an end by way of resignation on the part of an employee. It therefore possible for an employee to resign by way of conduct, or verbally, without a written resignation being submitted. In deciding whether such a resignation indeed exists, the conduct of the employee must be considered, in order to decide if it

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[15] Id at para 13.
[16] (2010) 31 ILJ 2923 (LC) at para 15.
[17] (2010) 31 ILJ 69 (SCA) at para 11.

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falls within the parameters of the abovementioned principles. I shall now proceed to apply these principles to the facts *in casu*, commencing with an evaluation and determination of the evidence.

[26] In considering the evidence in this case, I must immediately say that I have difficulties with the applicant's case, as it appears from his own testimony. In short, his evidence was entirely contradictory. In his opening address, the applicant says that he was not dismissed on 31 August 2011, as this was just the day that he left, and says he was actually dismissed on 28 September 2011. When giving evidence in chief, the applicant said nothing about Jordan dismissing him on 31 August 2011, and the high water mark of his case in chief was that Jordan had 'authorized' the applicant to leave, clearly meaning giving him permission to go home but contemplating his return. But then, and under cross examination, the applicant says that he was told on 31 August 2011 by Jordan to 'leave the company', meaning he was finally dismissed out of hand. In response to questions by the second respondent, the applicant says that he 'walked out' of the company on 31 August 2011. Finally, and again in response to a question by the second respondent, the applicant says that Jordan was 'forcing' him to resign. All of these different versions are incompatible, and an entirely unsatisfactory state of affairs. Notwithstanding the fact that this must surely materially detract from the applicant's credibility, this in my view causes applicant to simply fail to make out a probable case that he was dismissed, considering he has the *onus*.

[27] As opposed to this unsatisfactory evidence of the applicant, the evidence of Jordan as to the events on 31 August 2011 was consistent. His testimony made it clear that the applicant had twice said that he was resigning and would leave the company. The testimony of Harris confirmed this. Jordan and Harris immediately reported this to HR. Added to this, and before any dispute even arose, the third respondent dealt with the applicant having left on 31 August 2011, as a resignation. This is evident from the e-mails from Jordan and Harris to HR, and the telegram that was sent to the applicant confirming and then accepting his resignation. A final consideration is the undisputed evidence of Brits that where employees are dismissed, proper disciplinary processes are applied.

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[28] A further critical consideration is a piece of undisputed evidence, being that Jordan told the applicant that if he wanted to leave, he had to submit a letter of resignation, and the applicant then answered that he did not have time to complete a resignation letter, and then left. Considering this undisputed evidence, the immediate question that arises is why would Jordan ask the applicant for a resignation letter if he simply dismissed the applicant out of hand? And further, why would the applicant answer that he did not have time to complete a resignation letter if he never resigned in the first place? If Jordan simply dismissed the applicant out of hand, then surely the applicant would not say such a thing as not having time to complete a resignation letter. It is equally undisputed that the applicant immediately left when saying this, half way through his working day, leaving his access card at the gate when leaving. I accept Jordan's testimony that he never told the applicant to hand in his access card, and reject the applicant's contention in this respect. All of this must also be considered in the context that there was never any reason provided as to why Jordan would simply dismiss the applicant.

[29] If the applicant was indeed dismissed out of hand, then why does he not refer an unfair dismissal dispute to the CCMA immediately? I also consider the fact that when the applicant then finally refers his dispute to the CCMA, he only does so after having completed his pension withdrawal forms. Also, and now having had time to reflect at the point of referring the dispute to the CCMA on 28 September 2011, the applicant in the dispute referral form itself never says that he was dismissed out of hand by Jordan on 31 August 2011. Instead, and in summary of facts contained in the referral, the applicant says that he was told to leave and wait to be called, and he was still waiting to be called when he received the letter saying he resigned. Notwithstanding the fact that this is yet another contradictory version by the applicant, what is recorded in the referral is consistent with the applicant indeed having resigned, and the third respondent having dealt with him as such. I may add that the applicant in giving evidence disputed that he received the telegram, but in the referral indicates that he did receive it.

[30] The applicant also clearly had a difficulty with Jordan. He said he had an argument with Jordan and complained about him to Harris. Jordan disputed there was an argument, but conceded the applicant was agitated. On the

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probabilities, the applicant clearly had unresolved personal issues with Jordan. In my view, it is these issues motivated him to act as he did. This was the context giving rise to the events on 31 August 2011, and is equally consistent with the applicant deciding to leave the employ of the third respondent of his own accord. Again, there was simply no reason for Jordan to dismiss him.

[31] The second respondent put a number of pertinent questions to the applicant, which also highlighted the unacceptable nature of his testimony. As I have touched on above, the second respondent asked the applicant why Jordan was asking for resignation letter and the applicant answered 'he was forcing me to resign'. The second respondent asked the applicant why he left if he did not resign, and the applicant said that Jordan instructed him to leave. The questions of the second respondent also confirmed that Jordan said to the applicant that if the applicant left, he had to hand in a resignation letter, meaning it was the applicant's decision to leave. Finally, the applicant said to the second respondent in so many words that he 'walked out' on 31 August 2011. One can in the circumstances hardly take issue with the second respondent concluding that the applicant resigned and left of his own accord.

[32] A final issue to consider is the fact the applicant, when he e-mails Brits on 26 September 2011, never even makes mention of being dismissed by Jordan. When Brits answered him and said that he resigned and had to make an appointment to come and sign the pension withdrawal documents, the applicant equally raises no complaint and disputes that he resigned, which one would expect if this was not the case. Instead, the applicant in fact immediately on the same day makes arrangements to come and sign these documents, and then does so. Again, this is not behaviour consistent with an employee that has been arbitrarily dismissed, out of hand, by his manager, but is consistent with the conduct of an employee that resigned of his own accord.

[33] In the end, a proper consideration of the evidence, as I have set out above, leaves me with little doubt that the applicant verbally resigned on 31 August 2011, and himself decided to finally leave the employment of the third respondent on that date of his own accord. All the elements constituting a termination of employment by the applicant is present, in that:

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33.1 The applicant clearly, unambiguously and unequivocally indicated his intention to the third respondent that he wanted to leave employment;

33.2 The applicant indicated that he wanted to leave employment, effective immediately;

33.3 The conduct of the applicant was unilateral, and final;

33.4 The conduct of the applicant, established holistically from the evidence, would leave a reasonable person with the belief that the applicant had the intention to bring the employment relationship to an end, and then acted accordingly;

33.5 The contradictory nature of the applicant's evidence as to the circumstances of his termination of employment is indicative of a situation of the applicant disingenuously trying to extract himself from what he did, of his own accord, and after the fact.

[34] I am aware of the dictum in *Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC*[18] where the Court said: 'Resignation brings the contract to an end <u>if it is accepted by the employer</u> ….' (emphasis added). This of course contradicts the abovementioned authorities to the effect that no acceptance by the employer is required. However, and even if acceptance is required, it is clear from the evidence that the third respondent indeed accepted the resignation, by way of the telegram sent on 31 August 2011. The employment contract was thus indeed brought to an end due to the resignation of the applicant.

[35] All being said, the award of the second respondent was thus correct. The second respondent properly considered the evidence and all the applicable legal principles. The applicant was never dismissed, but in fact verbally resigned on 31 August 2015 in a final and unilateral act, and left. The second respondent's award must thus be sustained, and the applicant's review application falls to be dismissed.

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[18] (2002) 23 ILJ 695 (LAC) at para 33.

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[36] This then only leaves the issue of costs. In terms of section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. The applicant throughout represented himself. I do not think he acted unreasonably in wanting to pursue his matter to finality, in the Labour Court. Therefore, and although the applicant was not successful, I consider it to be in the interest of fairness that no costs order be made.

Order

[37] In the premises, I make the following order:

1. The applicant's review application is dismissed.

2. There is no order as to costs.

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S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	In person
For the Third Respondent:	Advocate C Morend
Instructed by:	Allardyce & Partners Attorneys

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